

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Improve
Public Access to Public Records Pursuant
to the California Public Records Act.

FILED
PUBLIC UTILITIES COMMISSION
NOVEMBER 6, 2014
BAKERSFIELD, CALIFORNIA
RULEMAKING 14-11-001

**ORDER INSTITUTING RULEMAKING TO IMPROVE
PUBLIC ACCESS TO PUBLIC RECORDS PURSUANT TO THE
CALIFORNIA PUBLIC RECORDS ACT**

1. Summary

This Order Instituting Rulemaking (Rulemaking) builds on a process we started last year to increase public access to records furnished to the Commission by the entities we regulate, while ensuring that information truly deserving of confidential status retains that protection.

In Resolution L-436, *Resolution Regarding the Disclosure of Safety-Related Records*, issued on February 14, 2013, the Commission issued policies designed to ensure that the public would have easy access to certain safety-related data created by or furnished to the Commission. In addition, we committed to open a rulemaking to address improving the public's access to records that are not exempt under the California Public Records Act or other state or federal law. This is that Rulemaking.

2. Background

The public has a constitutional right to access most government information.¹ The California Constitution states that statutes, court rules, and other authority limiting access to information must be broadly construed if they further the people's right of access, and narrowly construed if they limit the right of access.² Rules that limit the right of access must be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.³

The California Public Records Act (CPRA) requires that public agency records be open to public inspection unless they are exempt from disclosure under the provisions of the CPRA.⁴ "Public records" are broadly defined to include all records "relating to the conduct of the people's business"; only

¹ Cal. Const. Article I, § 3(b)(1): "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." *See, e.g., International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-329.

² Cal. Const., Article 1, § 3(b)(2): "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest." *See, e.g., Sonoma County Employee's Retirement Assn. v. Superior Court (SCERA)* (2011) 198 Cal.App.4th 986, 991-992.

³ *Id.*

⁴ *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370: "The Public Records Act, section 6250 et seq., was enacted in 1968 and provides that 'every person has a right to inspect any public record, except as hereafter provided.' (§ 6253, subd. (a).) We have explained that the act was adopted 'for the explicit purpose of 'increasing freedom of information' by giving the public 'access to information in possession of public agencies.'" (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651 [citation omitted])."

records of a purely personal nature fall outside this definition.⁵ Since records received by a state regulatory agency from regulated entities relate to the agency's conduct of the people's regulatory business, the CPRA definition of public records includes records received by, as well as generated by, the agency.⁶

Further, the Legislature has declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."⁷ An agency must base a decision to withhold a public record in response to a CPRA request upon the specified exemptions listed in the CPRA, or a showing that, on the facts of a particular case, the public interest in confidentiality clearly outweighs the public interest in disclosure.⁸ The CPRA favors disclosure, and CPRA exemptions must be narrowly construed.⁹ The fact that a record may fall within a CPRA exemption does not preclude the agency from disclosing the record if the agency believes disclosure is in the public interest. Unless a record is subject to a law prohibiting disclosure, CPRA exemptions are permissive, not mandatory; they allow nondisclosure but do not prohibit disclosure.¹⁰ The CPRA requires the Commission to adopt written

⁵ See, e.g., *Cal. State University v. Superior Court* (2001) 90 Cal.App.4th 810, 825.

⁶ See Cal. Gov't Code §§ 6252(e).

⁷ Cal. Gov't. Code § 6250.

⁸ Cal. Gov't. Code § 6255(a): "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

⁹ Cal. Const., Article 1, § 3(b)(2), *supra*. See, e.g., *American Civil Liberties Union of Northern California v. Superior Court* (ACLU) (2011) 202 Cal.App.4th 55, 67; and *SCERA, supra*, 198 Cal.App.4th at 991-992.

¹⁰ See, e.g., *CBS, Inc. v. Block, supra*, 42 Cal.3d at 652; *ACLU, supra*, 202 Cal. App. 4th at 67-68 fn. 3; Cal. Gov't. Code § 6253(e); *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 905-906; *Black Panthers v. Kehoe* (1974) 42 Cal.App.3d 645, 656; *Re*

guidelines for access to agency records, and requires that such regulations and guidelines be consistent with the CPRA and reflect the intention of the Legislature to make agency records accessible to the public.¹¹

General Order 66-C (GO 66-C), first adopted in 1974, identifies all Commission records as public unless they fall within a short list of exemptions. However, the general order is outdated, it identifies several exemptions from public disclosure that are inconsistent with the CPRA, and it does not articulate the process and procedure for obtaining Commission records. Thus, this Order Instituting Rulemaking (OIR or Rulemaking) proposes a revised GO 66-D to replace GO 66-C and cure these deficiencies.

3. Discussion

The suggested revision of GO 66-C, attached to this order as proposed GO 66-D, includes the following:

- (1) Removes the recitation of records that are exempt from public disclosure. Restating the legal exemptions in the general order serves no purpose and risks misstating the governing law and obsolescence in the event of future legislative amendments to the CPRA.
- (2) Removes Pub. Util. Code § 583 as authority for exempting records from public disclosure. Section 583 “neither creates a privilege of nondisclosure for a utility, nor designates any specific types of documents as confidential.” (D.06-06-066, Section VII.) Section 583 precludes Commission officers and employees from publicly releasing information provided to the Commission by

San Diego Gas & Electric Company (SDG&E) (1993) 49 Cal.P.U.C.2d 241, 242; and D.05-04-030, at 8.

¹¹ Cal. Gov’t. Code § 6253.4(b): “Guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make the records accessible to the public....”

regulated utilities absent a Commission order, and GO 66-C is a Commission order directing the disclosure of public records in compliance with the CPRA.

(3) Articulates the procedure for the public to request public records, notice and opportunity to be heard by persons whose information would be disclosed if the request is granted, Commission's review and response to such requests, and the process for challenging the Commission's response. Although the articulated procedure generally reflects our current practice, it is not set forth or apparent to the public.

4. Preliminary Scoping Memo

We make the following preliminary determinations:

Issues:

1. Does the proposed revised general order comply with the CPRA setting forth written guidelines for access to Commission records, consistent with the Legislature's intent to make agency records accessible to the public?
2. Does the proposed revised general order reasonably improve the public's access to public records and increase transparency of the Commission's CPRA procedures without compromising the Commission's compliance with applicable laws and protection of confidential information? If not, please explain.
3. What categories of documents (both safety-related and non-safety-related) should the Commission disclose, if any, in response to a CPRA request without a vote of the Commission?

Category: This proceeding is preliminarily categorized as quasi-legislative. *Ex parte* communications are permitted without restriction or reporting requirement, until and unless the assigned Commissioner changes the category of the proceeding.

Need for hearing: We preliminarily determine that hearings are not needed.

Schedule: The following schedule is adopted, and may be revised by the assigned Commissioner or Administrative Law Judge as required to promote the efficient and fair resolution of the rulemaking:

Opening comments	December 12, 2014
Reply comments	January 9, 2015

5. Service of OIR

This OIR shall be served on the official service list for Rulemaking 05-06-040 (*Order Instituting Rulemaking to implement Senate Bill No. 1488 (2004 Cal. Stats., Ch. 690 (Sept. 22, 2004)) relating to confidentiality of information*) and on all persons on the service list used by the Commission for the purpose of serving notice of proposed changes to the Rules of Practice and Procedure (see <http://www.cpuc.ca.gov/PUC/practitioner>). *Service of this OIR does not confer party status or place a person who has received such service on the Official Service List for this proceeding.*

6. Addition to Official Service List and Party Status

Addition to the official service list is governed by Rule 1.9(f) of the Commission's Rules of Practice and Procedure (Rules).

Any person will be added to the "Information Only" category of the official service list upon request, for electronic service of all documents in the proceeding, and should do so promptly in order to ensure timely service of comments and other documents and correspondence in the proceeding. (*See* Rule 1.9(f).) The request must be sent to the Process Office by e-mail (process_office@cpuc.ca.gov) or letter (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102). Please include the Docket Number of this Rulemaking in the request.

Persons who file responsive comments thereby become parties to the proceeding (*see* Rule 1.4(a)(2)) and will be added to the “Parties” category of the official service list upon such filing. In order to assure service of comments and other documents and correspondence in advance of obtaining party status, persons should promptly request addition to the “Information Only” category as described above; they will be removed from that category upon obtaining party status.

7. Subscription Service

Persons may monitor the proceeding by subscribing to receive electronic copies of documents in this proceeding that are published on the Commission’s website. There is no need to be on the official service list in order to use the subscription service. Instructions for enrolling in the subscription service are available on the Commission’s website at <http://subscribecpuc.cpuc.ca.gov/>.

8. Filing and Service of Comments and Other Documents

Filing and service of comments and other documents in the proceeding are governed by the rules contained in Article 1 of the Commission’s Rules of Practice and Procedure. (*See* particularly Rules 1.5 through 1.10 and 1.13.)

If you have questions about the Commission’s filing and service procedures, contact the Docket Office.

9. Public Advisor

Any person or entity interested in participating in this Rulemaking who is unfamiliar with the Commission’s procedures should contact the Commission’s Public Advisor’s office in San Francisco at (415) 703-2074 or (866) 849-8390 or e-mail public.advisor@cpuc.ca.gov. The TTY number is (866) 836-7825.

10. Intervenor Compensation

Any party that expects to claim intervenor compensation for its participation in this Rulemaking must file its notice of intent to claim intervenor compensation within 30 days of the filing of reply comments, except that notice may be filed within 30 days of a prehearing conference in the event that one is held. (*See* Rule 17.1(a)(2).)

O R D E R

IT IS ORDERED that:

1. The Commission institutes this Rulemaking on its own motion to consider revisions to General Order 66-C to comply with the California Public Records Act and existing law.
2. The Executive Director will serve this Order on the service list for Rulemaking 05-06-040 and on all persons on the service list used by the Commission for the purpose of serving notice of proposed changes to the Rules of Practice and Procedure.
3. This Rulemaking is preliminarily determined to be quasi-legislative. It is preliminarily determined that evidentiary hearings are not needed in this proceeding.
4. Any person may file opening comments on the proposed revised general order by December 12, 2014, and reply comments by January 9, 2015. Commenters shall include in their opening comments any objections regarding the category, need for hearing, issues to be considered, or schedule.
5. Any party that expects to claim intervenor compensation for its participation in this Rulemaking must file its notice of intent to claim intervenor compensation within 30 days of the filing of reply comments, except that notice

may be filed within 30 days of a prehearing conference in the event that one is held. (*See* Rule 17.1(a)(2).)

6. The assigned Commissioner or assigned Administrative Law Judge may revise the schedule, as required to promote the efficient and fair resolution of the rulemaking.

This order is effective today.

Dated November 6, 2014, at Bakersfield, California.

MICHAEL R. PEEVEY

President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

CARLA J. PETERMAN

MICHAEL PICKER

Commissioners

ATTACHMENT

PROPOSED GENERAL ORDER 66-D

**PROCEDURES FOR OBTAINING PUBLIC RECORDS OF THE
CALIFORNIA PUBLIC UTILITIES COMMISSION PURSUANT TO THE
CALIFORNIA PUBLIC RECORDS ACT**

Adopted June 5, 1974; Effective June 5, 1974. Resolution No. L-151.

Amended June 25, 1974; Effective June is, 1974. Resolution No. DE 120.

Amended May 4, 1982; Effective May 4, 1982. Resolution No. L-224.

Amended _____

1. Public Records Request

Public records requests should be submitted to the Public Records Attorney of the Commission's Legal Division by using the electronic Public Records Request Form available at [hyperlink to be established]. If the requestor prefers to submit the request by regular mail or has copies of documents to submit in support of the request, they may do so by hard copy by regular mail to:

Public Records Attorney
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

2. Fees for Copies

Fees for copies shall be as posted on the Commission's website at [hyperlink to be established]. Checks for payment should be made payable to the Public Utilities Commission of the State of California.

3. Review of Request

Requests will be reviewed and processed by the Public Records Attorney, who shall promptly notify the person making the request of the determination of whether the records are disclosable, in accordance with Section 6253 of the California Public Records Act.

4. Grant of Request Where No Lawful Claim of Confidentiality

If the Public Records Attorney determines that disclosure of the requested records is mandated by a specific statute, regulation, or Commission order, or that they are disclosable pursuant to general legal authority and do not include information submitted to the Commission under a lawful claim of confidentiality, the Public Records Attorney shall make the records promptly available pursuant to Section 6253 of the California Public Records Act.

5. Commission Review of Request Where Lawful Claim of Confidentiality

If the Public Records Attorney determines that the requested records are disclosable pursuant to general legal authority but include information submitted to the Commission under a lawful claim of confidentiality, the Public Records Attorney shall prepare a draft resolution determining whether to disclose the records, for public review and comment pursuant to Pub. Util. Code § 311(g) and Rule 14.5 of the Commission's Rules of Practice and Procedure. The Commission shall serve the draft resolution on the requestor and any person whose information would be disclosed if the request is granted, if such person's contact information is available upon a reasonable and diligent search. The requestor, and any person whose information would be disclosed if the request is granted, may comment on the draft resolution by serving comments on the Public Records Attorney, by electronic mail to [email to be established] or by hard copy by regular mail to the address shown in Section 1.

The draft resolution will not appear on the Commission's agenda for a Commission vote sooner than 30 days from the date it is mailed. When the Commission acts on the draft resolution, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own resolution. Only when the Commission acts does the resolution become final.

6. Denial of Request, and Commission Review of Denied Request

If the Public Records Attorney determines that the requested records are not disclosable, the Public Records Attorney shall promptly notify the requestor pursuant to Section 6253 of the California Public Records Act.

If a request is denied in whole or in part, the requestor may appeal to the Commission for reconsideration by submitting the electronic Public Records Request Appeal Form available at [hyperlink to be established], indicating the records being withheld and stating the reasons why these records should be disclosed to them. If the requestor prefers to submit the appeal by regular mail or has copies of documents to submit in support of the appeal, they may do so by hard copy by regular mail to the Public Records Attorney at the address shown in Section 1.

The Public Records Attorney shall prepare a draft resolution addressing the appeal, for public review and comment pursuant to Pub. Util. Code § 311(g) and Rule 14.5 of the Commission's Rules of Practice and Procedure. The Commission shall serve the draft resolution on the requestor and any person whose information would be disclosed if the request is granted, if such person's contact information is available upon a reasonable and diligent search. The requestor, and any person whose information would be disclosed if the request is granted, may comment on the draft resolution by serving comments on the Public Records Attorney, by electronic mail to [email to be established] or by hard copy by regular mail to the address shown in Section 1.

The draft resolution will not appear on the Commission's agenda for a Commission vote sooner than 30 days from the date it is mailed. When the Commission acts on the draft resolution, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own resolution. Only when the Commission acts does the resolution become final.

7. Waiver of 30 Days Public Review and Comment Period

The Commission may reduce or waive the 30 day public review and comment period where the requestor, and any person whose information would be disclosed if the request is granted, so stipulate in comments on the draft resolution.

8. Judicial Review

The resolution is subject to judicial appeal pursuant to Pub. Util. Code § 1759.

(END OF ATTACHMENT)